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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 685

HERMAN A. PINEDO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari Directed to the United States Court of Appeals for the Ninth Circuit.

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Petition for Writ of Certiorari Directed to the United States Court of Appeals for the Ninth Circuit.

This is a petition for writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit to review and reverse a judgment refusing to vacate a plea of guilty by Herman A. Pinedo, petitioner, who was sentenced to three years in the penitentiary for allegedly filing false income tax returns for the years 1956, 1957 and 1958, which were, in fact, prepared by an accountant from records furnished by his wife and which involve the taxable sum of $1,226.33 for the year 1956, $2,332.65 for the year 1957 and $1,147.28 for the year 1958. Pinedo asserts his complete innocence.

JURISDICTION

Jurisdiction is conferred by Title 28, Section 1254, Sub. 1, U.S. Codes, Title 26, Section 7201 U. S. Code and by the Rules of this Court.

The decision of the United States Court of Appeals affirming the judgment below was entered June 18, 1965. A petition for rehearing was duly and regularly filed and thereafter was denied on September 21, 1965. This petition for certiorari is being filed within 30 days after the denial of the petition for rehearing.

STATUTES INVOLVED

Fifth Amendment, United States Constitution:

"No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

Sixth Amendment, United States Constitution:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, *and to have the Assistance of Counsel for his defence.*"

Title 26, Section 7201, United States Code:

"Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000

or imprisoned not more than 5 years, or both, together with the costs of prosecution."

Rule 32(d), Federal Rules of Criminal Procedure:

"*Withdrawal of Plea of Guilty.* A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

Rule 35, Federal Rules of Criminal Procedure:

"The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari."

OPINION BELOW

A copy of the opinion of the United States Court of Appeal is attached hereto as Appendix A, and made a part hereof. The opinion is set forth in 347 F.2d 142.

STATEMENT OF FACTS

The petitioner is a Mexican who operated a business feeding Braceros in Imperial Valley. Sometime in the year 1962, agents of the Internal Revenue Service checked up on the books and records prepared by an

accountant, Ricardo Jiminez, Jr., 144 South Fifth Street, El Centro, California, who had been retained for a period of ten years past to prepare the joint income tax return of both Mr. and Mrs. Pinedo. Pinedo never participated in these preparations. The returns were prepared by the accountant from books, records and data furnished by Mrs. Pinedo and were prepared in his office.

After the examination by the Internal Revenue Service, without the benefit of any counsel or any attorney, Pinedo and his wife, Celia C. Pinedo, were jointly indicted on October 3, 1962 for violation of Title 26, Section 7201 of the Internal Revenue Code.

On December 3, 1962 the Pinedos appeared in court, without counsel, and were arraigned and the case was continued until December 10, 1962 for plea. They had up to that time not consulted or conferred with counsel nor had any information regarding counsel. Pinedo, a 41 year old Mexican, had worked in the packing and shipping operations with Mexicans in lettuce harvesting in the Imperial Valley. There is no evidence that he had any knowledge of law or legal procedure nor that he was aware of the seriousness of the situation.

When Mr. and Mrs. Pinedo appeared, the court informed them that they had a right to have counsel and the matter was continued again.

According to Pinedo's motion and affidavit, after he left the courtroom he was accosted in the Federal Building by an attorney named Harry Alkow and was advised by Mr. Alkow that he (Mr. Alkow) would represent petitioner and his wife and would need $200. Petitioner

did not inquire of Mr. Alkow his experience or knowledge of federal court matters or tax matters and it later developed that Mr. Alkow had never handled a tax matter and was unfamiliar with federal court procedure, and was not competent to handle the matter. However, petitioner paid Mr. Alkow $200 and Mr. Alkow stated he would see him again. Mr. Alkow went to the Imperial Valley on one occasion and talked to Mr. Jiminez, the accountant, but only for five or ten minutes and not regarding the tax case. He did not at any time examine the books or records in the accountant's possession nor discuss any of the facts regarding the case with the accountant.

Although various continuances were had in the case, when the defendants appeared on October 7, 1963 Mr. Alkow advised the defendants to plead guilty and told petitioner to sign a document which the court requires, stating, among other things, that the defendant had told his counsel all the facts of his case and his counsel had advised him of his rights and the maximum punishment, and that probation may or may not be granted and that no promises were made. However, the petitioner stated that he did not read the document, that Alkow brought it over to him and said "Sign here" and petitioner, in obedience to his counsel's suggestion, did sign and thereafter petitioner and his wife, in answer to the question as to his plea, answered that he pleaded guilty.

Sentence was continued from October 7 to November 26, 1963, at which time petitioner was sentenced to three years in the penitentiary on the three counts. The court suspended petitioner's sentence until January 6, 1964.

Prior to the entry of the plea, Alkow had sought out Assistant United States Attorney Russell R. Hermann, who was in charge of the case for the government, and Hermann had assured Alkow that he felt confident that the Pinedos would each be granted probation. Alkow testified to this fact and it was not denied by the government or by Mr. Hermann that these representations had been made to the defendants' attorney. Alkow said that the Assistant United States Attorney said he would not ask for a prison sentence. At the time of sentencing, this promise by Mr. Hermann was carried out but the court did not take the silent recommendation of government counsel as binding or as effective in connection with his sentence in the matter.

Alkow admitted on examination that he had not read the petition or the statement which the Pinedos had signed and had not explained the effect. The trial judge commented that $200 wasn't much to try an income tax case covering three years and which might take several days to try. Nevertheless, he did not set aside the plea.

Petitioner, in his motion to vacate and set aside the plea, swore that Alkow told him to plead guilty as the quickest way and that he would get probation and not go to jail, and directed him (Pinedo) to do so.

In his motion to vacate and set aside the plea, petitioner asserts that he is innocent and that he should therefore recieve a trial on the merits; that up to the time that he was, in effect, solicited by the attorney to whom he paid a fee of $200, he had no advice of counsel, and after his sentence and until he conferred with George Chula and

present counsel, he was unaware of his rights. Petitioner's motion to set aside the plea was accompanied by letters from a great many persons who expressed confidence in his honesty and integrity, including a member of the Board of Supervisors of Imperial Valley, the mayor and the Chief of Police of Imperial Valley, church people, packers, the President of the Forty-fifth District Agricultural Association, the Director of the Imperial Irrigation District, the Imperial Valley Farmers' Association, the mayor of the City of Westmoreland, the mayor of the City of Brawley, pastors of churches, and many other persons.

Contrary to the opinion of the United States Court of Appeals, petitioner is not a man experienced in law; in fact, he apparently has never before been in a courtroom. He came to court unattended by a lawyer and then he got a lawyer because he was told that he should have one. It was only then that the lawyer was secured who certainly was inadequate to represent him. Although Alkow had been admitted to practice for some years, he never tried a federal tax case nor any other federal case. He did no preparing of the case, did not confer with the accountant, had no apparent factual knowledge of petitioner's situation and relied solely on a conference with an Assistant United States Attorney that the United States Attorney felt (possibly in view of the small amount involved and that he would not suggest imprisonment) that petitioner would be given probation.

The trial judge in this case was a former Collector of Internal Revenue for the District of Southern California before being appointed a federal judge.

QUESTIONS PRESENTED

1. Whether a plea of guilty entered by a defendant on advice of counsel, based upon promises by the United States Attorney that defendant would probably get probation and that he would not recommend confinement, was illegally obtained and in violation of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.

2. Whether any pressure upon the defendant to plead guilty results in manifest injustice requiring the court to set aside the judgment of conviction and permit the defendant to withdraw his plea.

3. Whether a sentence pronounced upon a defendant who had been misadvised by incompetent and sick counsel is an illegal sentence in violation of the due process clause of the Fifth Amendment to the Constitution of the United States.

4. Whether the obtaining of a judicial confession by means of a plea of guilty under the circumstances of this case violated the due process clause of the Fifth Amendment to the Constitution of the United States and was therefore void.

REASONS FOR GRANTING THE WRIT

This case raises an important question of criminal law and procedure under Rule 32(d) and Rule 35, Rules of Criminal Procedure for the District Courts of the United States and Fifth and Sixth Amendments to the Constitution of the United States, entitling a defendant to the effective aid of counsel.

We are at a loss to understand how any court could view this entire record and determine that petitioner, a Mexican dealing with laborers, could have a clear understanding of the meaning of his plea of guilty under the circumstances of this case.

Certainly, he was pressured by an attorney who received only $200 and who would not want to try a case that would take at least three days to try, and by statements of the United States Attorney, to his own attorney, that he would not recommend imprisonment and that the defendant would probably get probation. Certainly, no one who practices extensively in the federal courts can have any doubt that where government counsel does not recommend jail, that the court would not follow that recommendation. The present judge was formerly Collector of Internal Revenue for the Southern District of California and took a different view in this tax case. There can be no doubt that the petitioner was pressured into a plea of guilty by these assurances. A plea of guilty is, in effect, a judicial confession in open court.

In *People v. Dye*, 119 Cal.App. 262, the court said, in relation to confessions, any pressure upon a defendant's mind is sufficient to require the setting aside of a judgment.

In the *Dye* case the court also said:

"It is also true that if threats and inducements are made to a prisoner, and within a few days thereafter he makes a confession, such acknowledgment of the commission of the crime may not be introduced in evidence unless it clearly appears that the threats and in-

ducements had ceased to operate upon his mind to bring about his statement of his own guilt. (*People v. Johnson*, 41 Cal. 455.)" (*People v. Loper*, 159 Cal. 6, at p. 14 [Ann. Cas. 1912B, 1193, 112 Pac. 720, 723]. See, also, *People v. Russell*, 77 Cal. App. 113, 118 [246 Pac. 110]; *People v. Quan Gim Gow*, 23 Cal. App. 507 [138 Pac. 918].) To "threats and inducements" we think it appropriate to add, any illegal process whereby through external means of pressure the free will of the defendant has been overcome."

Surely, an examination of this entire record shows that the proceedings were, in effect, a sham similar to that which took place in *Powell v. Alabama*, 287 U.S. 45, 77 L.ed. 158 and *Cook v. United States*, 267 U.S. 517, 69 L.ed. 767.

In *Bergen v. United States*, 145 F.2d 181, the court held that in view of all the circumstances the defendant should have been allowed to withdraw a plea of guilty.

"An intelligent and full understanding by the accused of the charge against him is a first requirement of due process."

Bergen v. United States, 145 F.2d 181

Ammons v. King, 133 F.2d 270, 272

Smith v. O'Grady, 312 U.S. 329, 85 L.ed. 859

The Fifth and Sixth Amendments require that a defendant be given the effective assistance of counsel.

Powell v. Alabama, 287 U.S. 45, 77 L.ed. 158

Lisenba v. California, 314 U.S. 219, 262, 86 L.ed. 166

Where the statement was made by promises concerning action to be taken by a public official with reference to the crime, likely to cause the accused to make such a statement falsely, it is a violation of due process of law not to set aside the plea.

Leyra v. Denno, 347 U.S. 556
Chambers v. Florida, 309 U.S. 227, 84 L.ed. 716
Ashcraft v. Tennessee, 332 U.S. 143, 88 L.ed. 1192

Powell v. Alabama, 287 U.S. 45, 77 L.ed. 158, requires not only that one be provided with counsel but that one be provided with the effective assistance of counsel, and that it not be a sham and ineffective as it was in the instant case.

As the court in *Brubaker v. Dixson,* 310 F.2d 30, 37, said, due process requires "counsel reasonably likely to render and rendering reasonably effective assistance." Did Alkow reasonably render "effective assistance"? He did not confer with the accountant regarding the books and records; he did not go over the tax figures; he had no conferences with the defendant regarding the facts of the case; he was entirely unfamiliar with the case; he certainly was not prepared to go to trial on the date the case was set for trial; he had not subpoenaed a single witness nor interviewed a single witness; he had certainly done nothing more than talk to the United States Attorney about what recommendation the United States Attorney would make with reference to imprisonment and that there would be no such recommendation made and, based on that, he rushed the petitioner into signing a document which he did not read to the petitioner and

which petitioner did not read and which he did not discuss or confer with petitioner regarding the same. Could this be said to render "effective assistance" to a Mexican who had never been in court before and who had a fine standing in his community for integrity? We respectfully submit that it was not effective assistance in the light that a lawyer's duty is to be fully prepared and to discuss every phase of the case. Even the trial judge acknowleged that "I think he (Alkow) can be very seriously criticized for the way this case has been handled, but I do not believe that that justifies the setting aside of the judgment."

We respectfully disagree with the trial judge's view and the view of the Circuit Court and we respectfully urge this Court to grant certiorari to establish effectively the liberal right of an accused to a trial on its merits. The whole tendency of courts today is to let people have their cases tried on their merits. In civil cases demurrers are overruled and pleadings are allowed great liberality so that cases can be tried on their merits. Even in criminal cases great liberality is permitted in connection with criminal pleadings.

We submit that this Court should grant a hearing and hold that petitioner is entitled to a trial on the merits. We respectfully submit that the judgments below should be reversed.

Respectfully submitted,

MORRIS LAVINE

Attorney for Petitioner

APPENDIX

United States Court of Appeals

FOR THE NINTH CIRCUIT

HERMAN A. PINEDO, *Appellant,* *vs.* UNITED STATES OF AMERICA, *Appellee.*	No. 19,220

[June 18, 1965]

Appeal from the United States District Court
for the Southern District of California
Central Division

Before: BARNES and ELY, Circuit Judges; and
PENCE, District Judge

PENCE, District Judge:

Herman A. Pinedo, appellant, and his wife Celia C. Pinedo, were jointly indicted on October 3, 1962, for violating 26 U.S.C. § 7201, viz., wilfully attempting to evade payment of part of their United States income tax due for the calendar years 1956, 1957 and 1958, by filing false joint income tax returns whereby in each year they stated that their taxable income was nothing and therefore they owed nothing to the United States, whereas, the indictment alleged, for the year 1956 they had a tax-

able income of $5,937.88 with a tax of $1,226.33 due thereon, 1957 taxable income of $10,510.20 with a tax of $2,332.65 due, and 1958 taxable income of $5,578.56 with a tax of $1,147.28 due.

On December 3, 1962, the Pinedos appeared in court without counsel, were arraigned, and the case continued until December 10, 1962, for plea. On that day, the two appeared with their retained attorney, Alkow, and the matter of plea was continued until December 17, 1962. Each then pled not guilty to each of the three counts and trial was set for May 6, 1963. On May 6th, trial was continued until October 7, 1963. On that day, Alkow advised the court that the Pinedos wished to withdraw their plea of not guilty and enter pleas of guilty as charged in each of the three counts.

Under the practice of that district court, before a defendant is allowed to plead guilty, he is required to sign, in open court and in the presence of his attorney, a petition to enter a plea of guilty on a form supplied by the court. As to parts pertinent here, the petition recites that the defendant has told his counsel all of the facts of the case, that counsel has fully advised him of his rights and possible defenses, the maximum punishment, and that probation may or may not be granted. It further recites that the defendant declares that no one has made any promise that he would receive probation if he pled guilty; that he hopes to receive probation but is prepared to accept any sentence the court might impose; that he makes no claim of innocence; and that he understands the statements in the indictment and the petition. This petition is accompanied by a certificate of counsel which recites

inter alia that counsel has read and explained the petition to the defendant.

The petitions and certificates were signed by each defendant and by counsel in this case. Immediately thereafter, Pinedo was asked by the clerk as to his plea, to each count, and as to each count, upon his plea of "Guilty", the clerk then asked him: "Do you now plead guilty because you are guilty?", and each time the answer of Pinedo was "Yes." At the same time, the same procedure was followed by and for Mrs. Pinedo, who likewise changed her plea from not guilty to guilty.

The matter of sentence as to each was continued from October 7th to November 26, 1963, at which time Pinedo was sentenced to a concurrent period of three years on each of the three counts. Mrs. Pinedo was placed on probation. The court suspended execution of Pinedo's sentence until January 6, 1964.

On January 14, 1964, Pinedo, with a new attorney, filed a motion to vacate and set aside the judgment of the court[1] or in the alternative, modify the sentence and grant Pinedo probation. The grounds claimed by Pinedo were that (1) he was innocent; (2) he was incompetently represented by counsel; (3) at his attorney's direction he signed the position to enter a plea of guilty without having read or understood it. After a 3-day hearing, during which time Pinedo's first attorney, Alkow, his accountant, Jiminez, and Pinedo himself testified on his behalf, and the Internal Revenue Service investigator on the case also testified, the sentencing judge, on March

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[1]No such motion was ever filed by Mrs. Pinedo.

24, 1964, denied the defendant's motion. This appeal followed.

The points raised on appeal are:

1. The court erred in failing to set aside Pinedo's plea of guilty and judgment of conviction based thereon to correct manifest injustice, under Rule 32(d), F.R. Crim.P.[2]

2. The court erred in failing to correct an illegal sentence under Rule 35, F.R.Crim.P.[3]

3. The obtaining of a judicial confession (plea of guilty) under the circumstances of this case violated the due process clause of the Fifth Amendment[4] and was therefore void.

At the time of sentence, Pinedo was 41 years old. He was a high school graduate, and for 13 years before conviction had been employed in a supervisory capacity by a very large vegetable growing, packing and shipping company operating in California, Arizona and Mexico. In the company's lettuce harvesting operation in Imperial Valley it was Pinedo's responsibility to procure some 400 lettuce pickers, supervise the operation, maintenance and care of some 8 labor buses, and supervise the company's

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[2]Rule 32(d): "Withdrawal of Plea of Guilty . . . . [T]o correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

[3]Rule 35: "Correction or Reduction of Sentence . . . . The court may correct an illegal sentence at any time . . . ."

[4]Fifth Amendment, United States Constitution: "No person shall . . . be deprived of . . . liberty . . . without due process of law; . . . ."

3 labor camps in Imperial Valley for housing and feeding the employees. Pinedo was responsible for the daily reporting of field labor time for each picker and he also acted as paymaster. He handled the irrigation records for over 1,000 acres of farm land.

The tax fraud charges stem from the operation by the Pinedos of the labor — "bracero" — camps, i.e., the housing and feeding of the workers, for which the company paid Pinedo a contracted price and out of which Pinedo admittedly made a profit. Pinedo had paid the help, sometimes in cash and sometimes by check drawn upon his bank account. Mrs. Pinedo had handled the records. Neither Pinedo nor Mrs. Pinedo had ever reported to their accountant Jiminez that they had ever received any monies for operating such camps during the 10 years preceding the indictment. Pinedo admitted that he signed the joint returns but maintained that he had paid no attention to the figures, that he had left all of that up to his wife.

Pinedo also maintained that he would not have pled guilty if he had not been advised by his attorney to do so; that his attorney had assured him that if he pled guilty he would be given probation and all he would be forced to do was to pay to the Government the unpaid taxes.

At the hearing on Pinedo's motion to vacate, supra, attorney Alkow was vigorously examined by Pinedo's new attorney, the government attorney, and the court. He testified that he had several conferences with the Pinedos in Los Angeles and in Imperial Valley; that with Pinedo, he had attempted (unsuccessfully) to locate

some of the Mexican cooks and bracero camp employees who Pinedo said would substantiate the fact that he had made certain payments to them in cash; that he had had several conversations with the Assistant U.S. Attorney in charge of the case and that after the conferences he felt pretty confident that the Pinedos would each be granted probation. He insisted that he had explained the charges to the defendants; that each had understood the accusations; that he had discussed various aspects of the plea of guilty with them and did not hide the fact that there could be a prison sentence. Alkow said that the Assistant U.S. Attorney did not specifically promise to make a recommendation of leniency, but it was his understanding that the Government would not ask for a prison sentence.[5] While Alkow admitted he had not read the entire petition to the Pinedos, he insisted that he had gone over the form with them there in the courtroom before they signed it.

While the district court, during Alkow's examination, said it was not satisfied with Alkow's testimony and the way he had handled the case for the defendant, nevertheless, after all of the evidence was in, the court concluded:

> "I think he [Alkow] can be very seriously criticized for the way this case has been handled, but I do not believe that that justifies the setting aside of the judgment. I am satisfied in my own mind that the defendant had a fair hearing. If he had raised at any time this question that he didn't understand, I would have

[5]At the time of sentencing, the Government did not suggest imprisonment of Pinedo.

set aside his plea up to the time he was sentenced, but after he was sentenced, and then he discovered that his sentence included a term in a federal institution, then he changed his story. He changes his position. I don't think I can accept it. So the motions are denied." (T.R. 169-170)[6]

At the inception, the allegations in Pinedo's motion for relief under Rule 32(d) are rendered suspect by the fact that almost seven weeks elapsed between the day he pled guilty and the day he was sentenced, without any claim of innocence or misrepresentation of counsel, nor were any such claims made at the time of sentencing. Furthermore, the execution of the sentence was stayed until January 6, 1964—and thus forty-one days more passed by without any outcry of innocence or injustice.

The record does not show what transpired on or about January 6th other than that on the day Pinedo was supposed to surrender he apparently waited for Alkow at the United States Courthouse, but Alkow did not show up and Pinedo could not contact him. Pinedo's motion to set aside judgment of conviction under Rules 32(d) and 35 was not filed by his new attorney until January 14, 1964.

Pinedo is not a simpleton nor a fool. The record shows him to be an educated, intelligent, articulate person, fully capable of handling difficult situations demanding reason and judgment. He was aware of his obligation to pay taxes. He knew that he had made a profit on the bracero

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[6]*Cf. Reid v. U.S.*, 334 F.2d 915, 919 (9th Cir. 1964).

camp operations. He signed the Pinedos' joint returns. Even though at the hearing on the motions he attempted to relieve himself of all responsibility for his tax returns by saying that all such records were kept by his wife—claiming he was innocent because "I didn't make out the return. I left it all to my wife."—the district court had full opportunity to evaluate Pinedo's statements—as has this court. That court, like this, was not convinced that Pinedo is manifestly innocent of the charges to which he pled guilty.

If the record showed that the United States Attorney had promised that Pinedo would be placed on probation and that his plea of guilty was founded upon that promise, a different problem would be presented.[7] However, Alkow never once testified that any such promise had been made him by the United States Attorney. The strongest statement that Alkow could and did make was that the United States Attorney believed that the Pinedos would be placed on probation and that the United States Attorney did not propose to recommend imprisonment. If Alkow is to be believed at all, in making his representations to the Pinedos he did tell the Pinedos that he, as well as the United States Attorney, believed the Pinedos would get probation. Alkow insists that he told the Pinedos that if the judge wanted to impose a prison sentence he could do it.

Pinedo himself did not claim that Alkow had said that the United States Attorney had promised probation, testifying only that Alkow had reported to him that the United

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[7]*Machibroda v. U.S.*, 368 U.S. 487, 493 (1962).

States Attorney was "favorable to probation."[8] While Pinedo claimed that he had signed the petition and pled guilty because Alkow had promised that he and Mr. Pinedo would get probation, as indicated, Alkow denied making any such flat promise.

Alkow was an attorney of 25 years experience. Although he had never had a tax case before, in making his recommendations that the Pinedos plead guilty, he was faced with the fact that the money received from the bracero camp operations had never been reported on the Pinedos' tax returns during the prior ten years. When Pinedo claimed to have paid out much of the money in cash—thus indicating that it might be possible to prove that the expenses of the operation equaled the income—thereby denying profit—Alkow made a real effort to see if he could find proof of such payments. But even with Pinedo's assistance, the witnesses to whom Pinedo claimed he had made payments could not be found. As Alkow said, without witnesses Pinedo had no case. Even if Pinedo, at the hearing on his motion, had not *admitted* making a profit on the camp operations, we would agree with Alkow.

Even if the district court had found—which it did not—that, as Pinedo claimed, he had pled guilty only because of the assurance of Attorney Alkow that he would be given probation, the only question which would then be presented was whether on the underlying record it would constitute "manifest injustice" under Rule 32(d)

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[8]*Cf. U.S. v. Roland*, 318 F.2d 406 (4th Cir. 1963).

to refuse to set aside the plea and judgment of conviction.[9] As pointed out in *U.S. v. Parrino*, 212 F.2d 919, 921 (2nd Cir. 1954):

> "[I]n criminal cases, the defendant's surprise as to the severity of sentence imposed after a plea of guilty . . . is not such manifest injustice as to require vacation of the judgment and . . . to withdraw a plea of guilty.[2] [See cases cited.] . . . . [S]urprise . . . which results from erroneous information received from the defendant's own attorney, at least without a clear showing of unprofessional conduct, is not enough.[4] [See cases cited.]
>
> "[A]ny notion . . . that the Court guarantees the accuracy of information given by a member of its Bar to a client-defendant is obviously subject to the qualification that the Court represents not that members of its Bar are infallible but, at most, that they will function with due regard to their professional obligations." [Portion of note 4.]

It appears to this court, as it did to the district court, that Pinedo freely and knowingly entered his plea of guilt to the charges—to be sure hopefully believing, as did Alkow, that he would get probation. Long, long thereafter, after a sentence of imprisonment, and after he had consulted with another attorney, he claimed innocence. Proof in this case falls far short of showing any manifest injustice on the part of the district court in refusing to set aside Pinedo's plea and the court's judgment of conviction.

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[9] *Ridgeway v. U.S.*, 205 F.2d 680 (6th Cir. 1953).

As this court pointed out in *Kadwell v. U. S.*, 315 F.2d 667, 670:

> "Rule 32(d) imposes no limitation upon the withdrawal of a guilty plea *before* sentence is imposed and such leave 'should be freely allowed.' . . . . [W]ithdrawal of a guilty plea *after* sentence is conditioned . . . upon a showing of 'manifest injustice.' . . . . [I]f a plea of guilty could be retracted with ease *after* sentence, the accused might be encouraged to plead guilty to test the weight of potential punishment, and withdraw the plea if the sentence were unexpectedly severe."

Other decisions, likewise, repeatedly emphasize that disappointment in the sentence imposed is no ground for withdrawal of a guilty plea. (Id. note 11.)

Similar to the situation in *Zaffarano v. U. S.*, 330 F.2d 114 (9th Cir. 1964), here, too, was substantial evidence to support the trial court's finding that Pinedo's plea of guilt was freely and voluntarily made as a matter of law. This court will not disturb the trial court's ruling in the absence of an abuse of discretion.[10] We here find no such abuse.

As this court said in *Brubaker v. Dickson*, 310 F.2d 30, 37 (9th Cir. 1962), *cert. denied*, 372 U.S. 978:

> "Due process does not require 'errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render *and rendering* reasonably effective assistance.' [Note omitted.] Determining whether the demands of due process were met in

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[10] *Vasquez v. U.S.*, 279 F.2d 34, 37 (9th Cir. 1960).

such a case as this requires a decision as to whether 'upon the whole course of the proceedings,' and in all the attending circumstances, there was a denial of fundamental fairness; [note omitted] it is inevitably a question of judgment and degree."[11]

"Upon the whole course of the proceedings" here, the district court did not and this court does not find that Alkow did not render reasonably effective assistance to Pinedo, or that Pinedo was denied effective aid in the preparation and initial conclusion of Pinedo's case. Since under Rule 32(d) a district court has the power to grant a motion to set aside a plea of guilt after sentence only after such action appears to be necessary "to correct manifest injustice," the district court has a substantial discretion in making a determination of the requirements of justice. This court will reverse a refusal of such motion only after the record unequivocally demonstrates that such refusal was manifestly unjust,[12] and we find no such injustice manifested here.

There is no merit to appellant's claim of error under Rule 35. An illegal sentence as used in Rule 35 applies, *inter alia,* to a sentence which is not authorized by the judgment of conviction.[13] Pinedo's sentence of three years, on each of the three counts, to run concurrently,

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[11]*See also, Black v. U.S.,* 269 F.2d 38, 42 (9th Cir. 1959); *Peek v. U.S.,* 321 F.2d 934, 945 (9th Cir. 1963); *Reid v. U.S., supra; Wilson v. Gray,* .... F.2d .... (decided April. 21, 1965) (9th Cir.); *Bouchard v. U.S.,* ..... F.2d ..... (decided May 1, 1965) (9th Cir.).

[12]*U.S. v. Roland,* 318 F.2d 406, 409 (4th Cir. 1963); *U.S. v. Washington,* 341 F.2d 277, 281 (3rd Cir. 1965).

[13]*U. S. v. Morgan,* 346 U.S. 502, 505-506 (1954).

not being in excess of the permissible statutory penalty for the crime, was legal.

There is likewise no merit to appellant's third claim of error in that the obtaining of a judicial confession (plea of guilty) under the circumstances here violated the due process of the Fifth Amendment. We are not here faced with the problem of convictions involving use of judicial confessions during trial, and the cases cited by appellant[14] in support of this claim of error are completely inapposite. Here, as we have above determined, the comprehensive hearing in the district court on Pinedo's motion under Rule 32(d) fully complied with the requirements of the due process clause of the Fifth Amendment.

Affirmed.

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[14]*Lisenba v. California,* 314 U.S. 219 (1941); *Leyra v. Denno,* 347 U.S. 556 (1954); *Chambers v. Florida,* 309 U.S. 227 (1940); *Ashcraft v. Tennessee,* 322 U.S. 143 (1944).

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 685

HERMAN A. PINEDO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner and his wife were convicted on pleas of guilty to a three-count indictment charging them with wilfully attempting to evade income taxes owed for the years 1956, 1957 and 1958 by filing false and fraudulent returns, in violation of Section 7201 of the Internal Revenue Code of 1954 (R.I. 2–5).[1] Petitioner was sentenced to a three-year term of imprisonment on each count, the sentences to run concurrently; his wife received the same sentence, but execution of her sentence was suspended and she was placed on probation (R.I. 12).

[1] The record is in two volumes which are represented by "R.I." and "R.II."

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Approximately one-and-one half months after sentence was pronounced, petitioner moved under Rules 32(d) and 35 of the Federal Rules of Criminal Procedure to withdraw his plea of guilty and to correct his sentence (R.I. 14–16). He contended that he was innocent, that he had been incompetently represented by counsel at the time of his original plea, and that he had signed a petition to enter a guilty plea without reading or understanding it. The district judge conducted a hearing during which he heard testimony from petitioner, his wife, the accountant who prepared his tax returns, the attorney who had represented him when he pleaded guilty, and an Internal Revenue Agent (R.II. 5–157). The court then denied the motion (R.II. 170). The court of appeals affirmed on June 18, 1965, 347 F. 2d 142 (Pet. App. 1–13), and denied a petition for rehearing on September 21, 1965 (R.I. 88).

This case presents no issue warranting review by this Court. After a thorough hearing the district court concluded that there had been no "manifest injustice" justifying the relief authorized after sentence by Rule 32(d). Petitioner's attorney testified at the hearing that the United States Attorney had made no promises before sentencing (R.II. 50–52) and that counsel had advised petitioner that the judge could impose a prison sentence if he wanted to do so (R.II. 66). Petitioner's surprise at the severity of the sentence did not entitle him to withdraw the plea upon which it was based. See, *e.g.*, *Williams* v. *United States*, 192 F. 2d 39, 40 (C.A. 5); *United States* v. *Shneer*, 194 F. 2d 598, 600 (C.A. 3); *Ridgeway* v.

United States, 205 F. 2d 680 (C.A. 6); *United States* v. *Parrino*, 212 F. 2d 919, 921 (C.A. 2). Nor was any convincing testimony offered at the hearing to establish that petitioner was innocent—assuming, *arguendo*, that such evidence bears upon whether the former plea resulted in "manifest injustice." Petitioner admitted that he had realized profit during the years involved (R.II. 106–107); his only defense was that his wife had covered the tax returns when she gave them to him to sign (R.II 117, 153).

The court of appeals carefully reviewed the record and agreed with the district court's evaluation of the facts. No further consideration by this Court is required.[2] We respectfully submit that the petition for a writ of certiorari should be denied.

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JOSEPH M. HOWARD,
JOHN M. BRANT,
Attorneys.

NOVEMBER 1965.

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[2] Petitioner's claim that he is entitled to correction of sentence under Rule 35 because his counsel was incompetent is unsound. Rule 35 pertains to the correction of sentences which exceed statutory limits or are otherwise illegal on their face. See *United States* v. *Morgan*, 346 U.S. 502, 505–506; *Heflin* v. *United States*, 358 U.S. 415, 418, 422; *Hill* v. *United States*, 368 U.S. 424, 430.

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